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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 370.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTION PRESENTED.

Restated upon the facts established by the record in this case, the question presented is:

> "Where a four-wheeled gasoline motor car is used to pull a four-wheeled truck in order to move men and equipment on a railroad, are these vehicles exempted from the provisions of the Safety Appliance Acts?"

STATEMENT.

Petitioners "Statement" must be supplemented to make it absolutely clear that there is **not a word of evidence in this record that railroad motor cars are usually, customarily or ever used to pull loaded trucks.** Evidence was admitted by agreement to prove that the railroads use many motor cars and many trucks which are "capable of being towed by motor cars" (R. 78a). But there is no admission and no proof whatsoever that they **are** so used.

Similarly, it was conceded that the Interstate Commerce Commission had never adopted standards for these vehicles or interpreted the Acts to apply to them—**but** there is not a word of evidence in the record that the Commission ever knew that motor cars were usually, customarily or **ever** used to haul loaded trucks in order to move men and equipment.

Contrary to petitioner's statement, there is no word of evidence in this record showing any necessity for such hauling.

The very order of the Commission upon which petitioner places reliance clearly demonstrates the fallacy of its position. The Court of Appeals (App. 11) has pointed out that the **actual use** of the equipment controls over its name.

OPINION OF THE COURT BELOW.

(223 F. 2d 660.)

The Court of Appeals has here held clearly and without cavil that when a four-wheel motor car is used to pull a four-wheel truck in order to haul men and equipment on a railroad, both vehicles are subject to the provisions of the

Safety Appliance Acts. In this holding, its decision conforms to every prior decision of this Court and every appellate court in the country—**there are no exceptions, there is no opinion to the contrary.**

REASONS FOR REFUSING THE WRIT.

I.

The decision below is in complete conformity with the decisions of this Court and every appellate court in the country which has ever considered a case involving the Section 6 exemption.

Hoffman v. New York, N. H. & H. R. Co. (C. A. 2), 74 F. 2d 227, cert. den. 294 U. S. 715;
Spokane & E. I. R. Co. v. United States, 241 U. S. 344;
Martin v. Johnston (Fla.), 79 So. 2d 419;
Chicago R. I. & G. Ry. v. Bernnard (Tex.), 275 S. W. 505;
Dougall v. Spokane, P. & S. Ry. Co. (C. A. 9), 207 F. 2d 843, cert. den. 347 U. S. 904.

No appellate court in the land has ever excluded a four-wheeled vehicle from the protection of the Act. On the contrary, in the **Hoffman** case this Court refused to review a decision of the Second Circuit which specifically held that the Section 6 exemption did not apply to a gasoline tractor pulling a hand car (both four-wheeled vehicles). In the **Spokane** case this Court, in passing on the kindred Section 8 exemption, specifically stated (241 U. S. 350) that the Section 6 exemption applied only to logging cars. In the **Martin** case the Supreme Court of Florida was urged to apply the exemption to just such a motor car as was here

in use; it did not deem this argument to have sufficient merit even to warrant discussion. The **Bernnard** case was decided on a matter of pleading but it squarely supports the applicability of the Act to this type of vehicle. In the **Dougall** case, the Court assumed the applicability of the Act to motor cars.

Petitioner attempts to make a showing of conflict upon the fact that the Second Circuit, in the **Hoffman** case, concluded that the Section 6 exemption is limited to logging cars (as, in fact, did this Court in the **Spokane** case) while the Court below concluded that the exemption should be restricted to coal cars. It is pure sophistry to argue that this constitutes a conflict among the Circuits on the question here involved. **Neither Circuit and no other appellate court has ever held that the exemption is applicable to the vehicles here involved.** The most that can be said for petitioner's argument is that it may raise a question to be decided when a case arises which **does** involve a logging car or a coal car.

Students of this Court's policy have said, in discussing conflicting decisions below as ground for allowance of certiorari:

> "This means that there must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized."
>
> *Supreme Court Practice*, Stern & Grossman (2nd Ed.), page 110.

II.

The decision below does not affect any administrative interpretation of the Act.

The Interstate Commerce Commission, so far as this record discloses, has never been faced with a problem involving the use of a motor car to pull hand cars in order

to move men and equipment. So far as this record discloses, such a use has never been made of these vehicles before. In adopting standards for "locomotives", the Commission order of 1925 distinguished "for the purposes of this order" motor cars from locomotives **BUT** it made clear that "for the purposes of this order" a motor car is supposed to **carry** freight and passengers while a locomotive is supposed to **move other equipment.** As the Court below aptly stated (App. 11):

> "In the present case the motor track car was being used to haul another car, i. e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name."

The Court below again notes with approval the **Hoffman** case which held a gasoline tractor to be a locomotive when used to haul a hand car and the case of

United States v. Fort Worth and Denver City Ry. Co., 21 F. Supp. 916,

which held that a crane was a locomotive when used to haul other cars.

Even were the Commission's actions meaningful, they would not control the courts in the administration of the Act:

Shields v. Atlantic Coast Line, 350 U. S. 318;
Illinois Central R. R. v. Williams, 242 U. S. 462;
Southern Pacific Co. v. Carson (C. A. 9), 169 F. 2d 734.

In the **Shields** case, this Court recently held that the dome running board on a tank car was within the Safety Appliance Act even though not prescribed by the Commission. In the **Williams** case, this Court early rejected the argument that the Act required implementation by the

Commission before being effective. In the **Carson** case, the Ninth Circuit held that a "brake club" was a part of the hand-brake even though not prescribed by the Commission.

Nowhere in the decided cases can there be found any reason for the bewilderment expressed by petitioner as to the applicability of the Act. The rulings of the Courts are consistent and clear: a railroad vehicle used to haul another vehicle is a locomotive; a car is a car; when safety appliances are necessary for the protection of employees on such vehicles, they must be used. As the Ninth Circuit has said in

> *United States v. Atchinson, T. & S. F. Ry. Co.*, 156 F. 2d 457, 458-459:
>
> "We are not disposed to countenance the interpolation of exceptions not contained in the Safety Appliance Acts. That is the business of Congress. Aside from their lack of authority in the premises, the courts should not be moved by considerations of convenience or practicability to whittle away and eventually nullify the protection afforded by this beneficent legislation."

III.

There is no showing on this record that a novel, important and essential question should be reviewed.

The use and necessity of motor cars and trucks on the railroads may be conceded. That it is necessary to use motor cars to haul trucks is **not conceded, has not been proved** and **is not supported by a single word of evidence in this record.**

If it follows, as petitioner claims, that the railroads will have to equip vehicles with safety devices to protect their employees who are required to ride on such vehicles, they will be required only to serve the precise purposes of the Act and no more. A man can be maimed or killed as easily

on a motor car or a truck as he can on a locomotive or freight car. Had it been a truck which had come uncoupled from a motor car, the decedent would have been just as dead as he was in.

Coray v. Southern Pac. Co., 335 U. S. 520.

CONCLUSION.

The petition in the instant case presents no possible ground for review:

1. There is absolutely no conflict among the decisions of this Court or the Courts below; every appellate decision in our books sustains the judgment;

2. There is absolutely no administrative ruling or policy affected by this decision and, even if there had been one, the oft-repeated policy of the law would require the decision below;

3. There is no issue here involved of great, novel or practical importance to anyone except the seventy-one year old respondent who has not as yet received a penny of compensation for injuries which he suffered almost five years ago.

For these reasons it is prayed that the petition for certiorari be dismissed.

Respectfully submitted,

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